



24th March 2023

The Use and Application of Discretion for Development Applications

The Property Council of Australia - WA Division welcomes the opportunity to provide feedback on considered reforms pertaining to the use and application of discretion for development applications.

The Property Council supports the Department of Planning, Lands and Heritage's ambition to achieve greater transparency and clarity in the context of discretionary planning decision-making processes. Notably it was recommended in *Planning to Deliver*¹, that using discretion as a principal tool for achieving planning ambitions, such as greater urban density, can have unintended consequences and undermine trust in the planning system.

The opportunity to manage or limit discretion is intrinsically reliant on growing community understanding on what constitutes allowable discretion and ensuring planning frameworks are drafted to reflect the intensity of development contemplated by "increasing as-of-right heights, and managing the capacity for discretion"².

The following submission provides opportunities to ensure the final iteration of the *Draft Recommendations*³ enhances pathways for the appropriate use of discretion within the planning system.

The Property Council of Australia

The Property Council of Australia is the peak industry body representing the whole of the property industry. In Australia, the Property industry employs more than 1.4 million Australians and shapes the future of our communities and cities.

As industry leaders we support smarter planning, better infrastructure, sustainability, and globally competitive investment and tax settings which underpin the contribution our members make to the economic prosperity and social well-being of Australians.

The Property Council WA membership consists of more than 300 member companies. They are architects, urban designers, town planners, builders, investors and developers. Our members conceive of, invest in, design, build and manage the places that matter most — our homes, retirement living communities, shopping centres, office buildings, education, research and health precincts, tourism and hospitality venues.

¹ Property Council of Australia 2021, *Planning to Deliver*, Property Council of Australia, Perth.

² Ibid pg. 21

³ DPLH 2023, *Discretionary Decision Making - Draft Recommendations*, Department of Planning, Lands and Heritage.

This submission is informed by many of the Property Council's key member representatives and expert committee members.

Application of discretion

Appendix A included a recommendation to "Provide a clear statement for when discretion can be or ought to be applied".

The Property Council supports the concept of providing greater clarity around situations where discretion may be applied. However, the consultation frequently refers to occasions when discretion should not be applied, as opposed to emphasis on situations where discretion should be used by planning practitioners.

By placing emphasis on examples of where discretion is not appropriate, the consultation is inherently implying that discretion is a negative feature of the planning system, and its use should be restricted. As previously stated, the Property Council believes that discretion is a useful, normal, and essential tool, so believes that the sentiment surrounding its use should be altered to reflect this.

The Property Council recommends that provisions to the *Planning and Development (Local Planning Schemes) Regulations 2015* and associated guidance documents should focus on situations where it is appropriate for discretion to be used, whilst also being clear that provided positive examples do not represent an exhaustive list.

Localised limitation of discretionary powers

Recommendation 5 in the *Recommended Provisions - LPS Regulation* consultation proposes "Providing for the localised limitation of discretionary powers in specific scenarios or locations through the inclusion of appendices/schedules in the Model Provisions"⁴.

The Property Council does not support this recommendation. While it is noted that local governments would be required to go through a formal scheme amendment process, including advertising and Ministerial approval, in order to include non-discretionary development standards in the local planning scheme, it is the Property Council's position that the recommendation negates the outcomes sought by this consultation.

Providing a pathway for local governments to limit discretion will create inconsistency and undo any efforts undertaken by DPLH to create transparency within the planning process. There is also a risk the localised limitations could create a two-tier system if it is the intention of the new permanent pathway for the assessment of development applications of State and regional significance to permit greater discretionary power. The Property Council recommends that this recommendation should not be considered for implementation.

Communication of variations to development standards

Recommendation 3 in the *Recommended Provisions - LPS Regulation* consultation proposes that prescribed decision-making forms be reviewed to ensure a consistent approach across all decision-making in the communication of variations to development standards.

⁴ Ibid

The Property Council is generally supportive of this recommendation. Clearly communicated reasoning of why discretion has been applied to a decision will help make the decision-making process more transparent to the public, potentially enhancing trust in the planning system. The Property Council seeks further assurance that the actions required by this recommendation will not result in delays to the issuing of approvals or planning decisions. Further guidance from the Department on how timeliness will be upheld would be welcomed.

Consistency of discretion across local planning frameworks

Finally, Recommendation 4 of the consultation proposes that fragmented references to variations and relevant considerations be consolidated to ensure that they are consistent across local government. The consolidation process could be done through the formalisation of clause 34 of the Model Provisions and inserting the formalised clause into the Deemed Provisions.

The Property Council is supportive of the recommendation to include a clause within the Deemed Provisions that ensures consistent inclusion of discretion across local government planning schemes. However, as previously highlighted, the wording of any proposed clause should not act to limit where discretion can be utilised.

General Comments

There exists an opportunity for this review to include a mandate for referral agencies to support development where discretionary powers have been exercised to approve a planning proposal. It should be a consideration of this review on how decisions that utilise discretion are supported by referral agencies.

The Property Council believes that referral agencies should facilitate planning decisions and that it is the responsibility of referral agencies to be conduits for planning objectives, rather than create unnecessary obstacles to the delivery of quality built-form products.

Next Steps

If you require further information or clarification, please contact Lindsay Duncan, WA Policy Advisor at 0404 450 881 or lduncan@propertycouncil.com.au.

Yours sincerely,



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Property Council of Australia